
(2013) 06 GAU CK 0036
In the Gauhati High Court
Case No : Writ Petition (C) No. 83 (K) of 2013

Pele Khezhie

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 20-06-2013

Acts Referred:

Citation : (2013) 4 GLT 537

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : Taka Masa and Mr. Arenlong, for the Appellant; N.M. Jamir, Addl. Sr. GA and Ms. V. Suokhrie, for the Respondent

Judgement

B.D. Agarwal, J.—This writ petition under Article 226 of the Constitution of India has been filed by an unsuccessful tenderer so as to challenge the Work Order No. NLD/RMSA/NIT/2010-11 dated 07.01.2013, issued by the State Mission Director, Nagaland, Kohima (Annexure-F), whereby the work for construction of school buildings in the district of Kohima has been awarded to the respondent No. 4.

Heard Mr. Taka Masa, learned counsel for the petitioner. Also heard Mr. N.M. Jamir, learned Additional Senior Government Advocate appealing for the respondent Nos. 1 to 3 as well as Ms. V. Suokhrie, learned counsel for the respondent No. 4.

Gist of the case is that a short notice inviting tenders (briefly "NIT") was floated on 13.12.2012 inviting tenders for construction of 67 Government High Schools at various locations in eleven districts of Nagaland. For the district of Kohima five firms had submitted their tenders and three firms were disqualified in the technical bid. Hence, the tenders of the petitioner and that of the respondent No. 4 remained for consideration in the financial bid. As per the NIT the firms were supposed to quote the rates on percentage basis, i.e. above, below or at par with the NPWD Schedule of Rates of 2010 (in short "SOR 2010"). According to the respondents the writ petitioner quoted .5% below the SOR 2010 whereas, the

respondent No. 4 quoted the rate at par with SOR 2010. After analyzing the financial bid of both the tenderers the Tender Committee has accepted the tender of respondent No. 4 and has rejected the tender of the writ petitioner with the following remarks:-

Working at 5% below NPWD SoR 2010 in 2013 is most likely to result in compromising the work quality. The Committee do not consider this to be a workable rate without compromising quality. Hence, it is recommended that Work Order may be issued to M/s. Khedi Trade & Dev. Agency.

2. On the basis of the decision of the Tender Committee the concerned department has issued the work order to the private respondent vide impugned Order dated 07.01.2013, which is under challenged in this writ petition.

3. Mr. Taka Masa, learned counsel for the petitioner has submitted that though the writ petitioner had quoted 5% (1/2%) below the SOR 2010 the Tender Committee has wrongly noted that the petitioner had quoted 5% (five) below SOR 2010 and the said offer is not workable.

4. After perusing the original tender of the writ petitioner a lurking suspicion had developed in my mind that the dot prefixing 5% might have been put in the tender subsequent to the preparation of the comparative statement However, no such plea of manipulation of the tender has been taken by the respondents in their counter-affidavit Even otherwise Mr. Taka Masa, learned counsel for the petitioner has submitted that he has instructions from his client to accept the offer at 5% below the SOR 2010, if this Court approves the same. Hence, I am proceeding to examine the justification of rejection of the petitioner's tender even if it is presumed that he has quoted the rate 5% below SOR 2010.

5. Mr. N.M. Jamir, learned State counsel has submitted that the Tender Committee has rejected the bid of the writ petitioner consciously and in the interest of the State without any mala fide intention. The learned counsel submits that the bank certificate regarding financial solvency certificate submitted by the writ petitioner was one year old and it was not updated to take a view that the writ petitioner was found financially sound to execute the work. On these premises the learned Government counsel tried to defend the impugned work order.

6. Ms. V. Suokhrie, learned counsel for the respondent No. 4 argued at length to contend that the tender of the writ petitioner was defective inasmuch as the offered rate was not quoted in words and a scope was kept open to manipulate the rate subsequently. The learned counsel also supported the submission of the learned State counsel regarding solvency certificate of the writ petitioner. According to the learned counsel the solvency certificate of the respondent No. 4 was latest in time whereas the writ petitioner's solvency certificate was one year old and on this count also the writ petitioner is not entitled to get the work order. The learned counsel also submits that the ambit and scope of interference of the High Court in a decision pertaining to NIT/Contract Work is very limited. In

support of her submission the learned counsel has cited the authority of the Supreme Court rendered in the case of Jagdish Mandal Vs. State of Orissa and Others,

7. It is true that the High Court's jurisdiction to interfere in a decision relating to a contract work is very limited and it cannot sit as an appellate authority to re-examine the decision taken by a Technical Committee. At the same time the review jurisdiction of the High Court is not totally ousted. Without referring to any other decision in this regard it will suffice to reproduce the observations made by the Hon'ble Supreme Court in the case of Jagdish Mandal (supra), relied upon by the respondent No. 4 which are as below:-

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputed. The tenderer or contractor with a grievance can always seek damages in a civil court Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of panel consequences on a

tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

8. The admitted fact is that the tender of the writ petitioner was not rejected or declared defective on the ground that it had not quoted the rate in words. Even otherwise, the terms and conditions of the NIT did not stipulate that the tenderers must quote the rates both in figures and words. Though there was a controversy whether the writ petitioner had quoted 5% (half percent) or 5% below the SOR 2010 I will go by the official version since the comparative statement was prepared in presence of official and non-official persons. Even otherwise, the learned counsel for the petitioner agreed to accept the work order at 5% below the SOR 2010.

9. Coming to the issue of financial solvency certificate, I have compared the Bank certificates submitted by the writ petitioner as well as by respondent No. 4. It is true that Solvency Certificate of the private respondent was a recent one whereas the Solvency Certificate submitted by the petitioner was dated 5.12.2011. It may be mentioned that the last date of submission of tender was 21.12.2012. In this way, the certificate was just one year old. However, NIT did not stipulate for submission of Solvency Certificate from a Bank which should have been issued within a specified period. Even otherwise, the tender of the writ petitioner was not rejected on this ground. I am also of the view that since the writ petitioner was lowest, the concerned Department could have asked for a fresh Solvency Certificate from the writ petitioner.

9.1 At the same time, the Solvency Certificate of respondent No. 4 shows that the Bank was of the opinion that the respondent No. 4 can be allotted any work to the extent of Rs. 15 crore whereas the Bank certificate of the writ petitioner shows that its financial solvency was estimated to the tune of Rs. 20 crore. A comparison of both the Bank certificates indicate that the writ petitioner's financial solvency was better than respondent No. 4.

10. In view of the judgment of the Hon'ble Supreme Court rendered in the case of Jagdish Mandal (supra), judicial review in contractual matters is permissible if the decision of the concerned authority appears to be mala fide or intended to favour a particular person or the decision of the authority and the process adopted by it appears to be arbitrary or irrational and if the decision is not in public interest.

11. I have already noted earlier that the tender of the writ petitioner was rejected solely on the ground that the, rate offered by the petitioner was likely to compromise in work quality and as such the rate offered by such firm was found not to be a workable rate. However, the relevant file of the State respondents does not reflect as to on what basis the aforesaid decision was taken by the Tender Committee. The relevant file did not disclose any instance of non-execution of a civil work in Kohima district below 5% of SOR 2010 in the recent

past. In this regard, the learned counsel for the petitioner submits that SOR 2010 is applicable to the entire State of Nagaland whereas the writ petitioner had quoted his rate only for Kohima district. According to the learned counsel for the petitioner, in view of the logistics available in Kohima district, in comparison to districts situated in remote areas, the rate offered by the writ petitioner cannot be said to be unworkable.

12. Technical or Tender Committees, by whichever name called, are constituted to go into each and every aspect of tendering of government largesse. The final decision of the settling authority is greatly influenced by the opinion of such expert committee. Tender Committees are generally multi-member bodies to enable it to examine the tenders meticulously and give their reasoned and balanced opinion, which should not smack of any biased decision. However, in the instant case the opinion of the tender committee that the offer of the writ petitioner was un-workable is out and out an ipse-dixit and subjective opinion sans any logic behind it. If tender (s) are allowed to be rejected on such arbitrary and whimsical opinion it would frustrate the very purpose of constituting such expert committees, whose primary objective is to assess and evaluate the tenders fairly and with high degree of integrity so that no finger is raised on the impartiality of the opinion. However, in the present case the opinion of the tender committee is grossly lacking in this regard. On the other hand its opinion appears to be a tainted one and is liable to be rejected.

13. In my considered opinion, tenders are floated to obtain the minimum rate at which a Government work can be got executed. It is true that a lowest tenderer has no indefeasible right to get the work allotted to him. It has also been mentioned in the NIT that the department is not obliged to accept the lowest bid. At the same time, as observed in the case of Jagdish Mandal (supra) the concerned authorities have every right to reject a tender if it is of the opinion that the rate quoted by a particular firm is unduly low and unworkable. In the aforesaid cited case, the firm had quoted 99% below the estimated rate of the concerned department. However, in the case before me, the rate was quoted only below 5% of SOR 2010 and it cannot be said to be an absurdly low and a freak rate that may affect the quality of the work. Even otherwise, the concerned department is always under an obligation to monitor the quality of the work, irrespective of the rate at which a contract is allotted. Besides this a work order can be cancelled at any time if there is delay in its execution or dilution in the quality.

14. I have already mentioned earlier that the relevant file does not disclose as to what was the basis for coming to an opinion that the rate of the petitioner was unworkable. I am also of the view that it was in the interest of the State and public at large to get the work executed at a lower rate. However, in the case before me, the State respondent appears to be oblivious that awarding of the contract to respondent No. 4 would cost more to the State exchequer.

15. As per the work order the respondent No. 4 has to execute the work within

twelve months. The learned counsel for the petitioner submitted that her firm has already started execution of the work and at this stage it should not be disturbed by the High Court. However, this statement has been disputed by the learned counsel for the petitioner on the basis of certain certificates issued by village Gaonburas, Secretary of a colony, Village Education Committee etc. In these certificates it has been declared that no work for construction of school buildings has yet been started. The certificates have been issued in the last week of May 2013. Even otherwise, there was a stay order from this Court dated 24.5.2013.

16. I would also like to discuss one more factor which may indicate mala fide action on the part of the State respondents. The work order was issued on 7.1.2013 and stay order was passed by this Court on 24.5.2013. Despite that the State respondents have stated in their affidavit that a sum of Rs. 1,13,38,395/- (40% of the contract amount) has already been released to respondent No. 4 being mobilization advance. In my considered opinion, at least after receiving the stay order the State respondents should have asked respondent No. 4 to hold back the execution of the work, if at all undertaken. Even otherwise, the money was released only on 16.5.2013 and stay order was passed on 24.5.2013. The stay order coupled with the certificates issued by the Gaonburas and other authorities, I am of the view that respondent No. 4 must not have executed any part of the work.

17. For the reasons assigned herein above, the impugned order dated 7.1.2013 is hereby set aside. The State respondents, particularly, respondent No. 3 is directed to issue the Work Order to the writ petitioner immediately. The respondent No. 4 is directed to refund the mobilization advance to the concerned Department within 2 (two) weeks from today, failing which the respondent No. 4 shall be liable to pay interest thereon at the rate of 10% per month. It is made clear that if the respondent No. 4 has executed any work, it shall be entitled to recover the same from respondent No. 3. With the aforesaid directions the writ petition stands allowed.